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No. 04-721

IN THE SUPREME COURT OF THE UNITED STATES

MIKE EVANS, Warden, *Petitioner,*

v.

REGINALD CHAVIS, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

In *Carey v. Saffold*, 536 U.S. 214, 225 (2002), this Court held that, where a California prisoner "unreasonably" delays in filing a state habeas corpus petition after denial in a lower court, that application is not "'pending' during this period" and therefore does not toll the one-year statute of limitations for filing federal habeas corpus petitions. The Court further held that the California Supreme Court's denial of a habeas petition on the merits does not itself "indicate that the petition was timely." *Id.* at 226. The question presented is:

Did the Ninth Circuit contravene this Court's decision in *Carey v. Saffold* when it held that a prisoner who delayed more than three years before filing a habeas petition with the California Supreme Court did not "unreasonably" delay in filing the petition -- and therefore was entitled to tolling during that entire period -- because the California Supreme Court summarily denied the petition without comment or citation, which the Ninth Circuit construes as a denial "on the merits"?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) is reported as *Chavis v. LeMarque*, 382 F.3d 921 (9th Cir. 2004). Pet. App. A. The United States District Court's September 20, 2001, order adopting the findings and recommendations of the magistrate judge and granting the Warden's motion to dismiss the application for writ of habeas corpus (Pet. App. C) is unpublished.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on August 27, 2004. The petition for writ of certiorari was filed on November 22, 2004, and granted on May 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2244(d) of Title 28 of the United States Code sets forth the following one-year statute of limitations period and tolling provision for an application for a writ of habeas corpus by a state prisoner held in custody pursuant to the judgment of a state court:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year statute of limitations for state prisoners seeking habeas relief in federal courts. 28 U.S.C. § 2244(d)(1). This period of limitation was intended to address the problem of delay in seeking federal habeas review and thereby protect society's interest in the finality of judgments.

Duncan v. Walker, 533 U.S. 167, 179 (2001). To accommodate concerns of comity by affording the states the first opportunity to resolve federal constitutional claims arising from their judgments, the period of limitation is tolled while a prisoner is making proper use of his or her state's established procedures for collateral review. 28 U.S.C. § 2244(d)(2); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999).

This Court has held that a prisoner who does not comply with state timeliness standards while pursuing collateral review in state court loses the benefit of the tolling provision. *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1812 (2005); *Carey v. Saffold*, 536 U.S. 214, 225-26 (2002). In the decision below, the Ninth Circuit refused to follow this Court's instructions to determine whether a state petition for habeas corpus was timely filed before finding that it was "pending" during a three-year period of inactivity between denial by a lower court and filing at the next level. Instead, the Ninth Circuit simply applied its own conclusive presumption: all petitions summarily denied by the state court without explanation are timely filed and toll the limitations period, no matter how lengthy the delay. The Ninth Circuit's decision disregards this Court's decision in *Saffold*, disregards California state law governing the timeliness of habeas petitions, and undermines the AEDPA limitations period.

A. California's Habeas Corpus Scheme

In California, prisoners seeking to bring collateral challenges to their convictions do so by filing a petition for writ of habeas corpus. Cal. Penal Code §§ 1473, 1474; *People v. Duvall*, 886 P.2d 1252, 1258 (Cal. 1995); *People v. Romero*, 883 P.2d 388, 391 (Cal. 1994). The California Constitution grants original jurisdiction in habeas corpus proceedings to "[t]he Supreme Court, courts of appeal, superior courts, and their judges."[1/] Cal. Const., art. VI, § 10; *Romero*, 883 P.2d at

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1. After denial of habeas relief by the Court of Appeal, a California

391.

The habeas corpus petition "must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 855 P.2d 391, 398 n.7 (Cal. 1993). The petitioner bears the burden of establishing the absence of substantial delay, or good cause for the delay, or that the case comes within one of the exceptions to imposition of the procedural bar of untimeliness identified in *In re Clark*, 855 P.2d 729, 760-61 (Cal. 1993).

A petitioner proceeding in pro se must use a form approved by the California Judicial Council. Cal. Rules of Court, rule 4.551. The form leads a petitioner through all the requirements for stating his or her grounds for relief. California Judicial Council Forms, form MC-275, *available at* http://www.courtinfo.ca.gov/cgi-bin/forms.cgi. In particular, question 15 of the form instructs the petitioner to "[e]xplain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304)" and provides space for a response. *See* J.A. 20. The petition need not be served on the respondent. *Clark*, 855 P.2d at 761 n.36.

When a California appellate court first considers a habeas petition, "[u]nless a procedural bar is apparent, the court will determine whether the petition states a prima facie case for relief, i.e., whether it states facts which, if true, entitle the petitioner to relief." *Clark*, 855 P.2d at 741 n.9; *accord*, *Duvall*, 886 P.2d at 1258. "If no prima facie case for relief is stated, the court will summarily deny the petition." *Duvall*, 886 P.2d at 1258; *accord*, *Clark*, 855 P.2d at 749. Similarly, if a

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prisoner may seek review in the California Supreme Court either by filing an original petition for writ of habeas corpus or "preferably" by filing a petition for review in the California Supreme Court within ten days. *In re Reed*, 663 P.2d 216, 217 n.2 (Cal. 1983), *overruled on another ground by In re Alva*, 92 P.3d 311, 312 (Cal. 2004); *see* Cal. Penal Code § 1506; Cal. Rules of Court, rule 28(e)(1).

procedural bar is "apparent," the court will issue a summary denial. *Clark*, 855 P.2d at 741 n.9; *accord*, *Romero*, 883 P.2d at 391. California law does not require a statement of reasons for such a denial. *In re Mazoros*, 142 Cal. Rptr. 609, 610 (Cal. Ct. App. 1977); *see* Cal. Const, art. VI, § 14.

If the appellate court's "preliminary assessment" is that the petitioner would be entitled to relief if his factual allegations are proved, the court either grants the writ or issues an order to show cause why relief should not be granted.[2] *Duvall*, 886 P.2d at 1258-59. This "institute[s] a proceeding in which issues of fact are to be framed and decided." *Romero*, 883 P.2d at 393 (quoting *Hochberg*, 471 P.2d at 5 n.4). Once the order to show cause or writ issues, the custodian must have an opportunity to respond, and the court must resolve the case "in writing with reasons stated." *Id.* (quoting Cal. Const., art. VI, § 14).

The respondent custodian files a "responsive pleading, called a return, justifying the confinement." *Duvall*, 886 P.2d at 1259. The petitioner responds to the return in a pleading called a "traverse." *Id.* at 1260. Through the return and the traverse "both factual and legal issues are joined for review." *Id.* at 1261; *accord*, *Romero*, 883 P.2d at 392.

If the court finds that there are material facts in dispute, it will order an evidentiary hearing. *Duvall*, 886 P.2d at 1261; *Romero*, 883 P.2d at 393. If there are no disputed factual issues as to matters outside the record, the court decides the merits without a hearing. *Duvall*, 886 P.2d at 1261.

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2. California statutes relating to habeas corpus provide that the writ should be granted and the custodian commanded to "have the body of such person before the court or judge" when the petition states a prima facie case. Cal. Penal Code §§ 1476, 1477. Because the appellate courts are not well-suited for having prisoners brought before them or for conducting evidentiary hearings, in most cases the courts will instead utilize the practice of ordering the custodian to show cause why the relief sought should not be granted. *Clark*, 855 P.2d at 743 n.10; *In re Hochberg*, 471 P.2d 1, 4 n.2 (Cal. 1970).

B. State Court Proceedings

Respondent Reginald Chavis was found guilty in California state court on July 29, 1991, of attempted murder and mayhem with related findings of firearm use and great bodily injury. Pet. App. A at 3; *see also* Exh. B to Petition for Writ of Habeas Corpus, filed in U.S. Dist. Ct. Aug. 30, 2000 (Federal Petition). He was sentenced to state prison for an indeterminate term of life with the possibility of parole, plus eight years for sentencing enhancements. Pet. App. D at 2; *see also* Exh. B to Federal Petition. After an unsuccessful appeal and petition for review, Chavis's conviction became final on January 26, 1993. Pet. App. D at 4.

Chavis filed his first state petition for writ of habeas corpus in the Sacramento County Superior Court on May 14, 1993, and it was denied by the court on July 30, 1993. Pet. App. A at 4. On August 22, 1994, he filed a petition for writ of habeas corpus with the California Court of Appeal, which was summarily denied without comment on September 29, 1994. *Id.* at 5.

More than three years later, on November 10, 1997, Chavis filed a petition for writ of habeas corpus in the California Supreme Court, presenting the same claims plus one new subclaim for his claim of ineffective assistance of trial counsel.[3] *Id.*; Pet. App. F at 1. It is this state habeas petition that lies at the center of the instant dispute. On April 29, 1998, the California Supreme Court summarily denied the petition through an order stating, in its entirety, "Petition for writ of habeas corpus is denied." J.A. 32; Pet. App. A at 5.

Chavis then embarked on a second round of unsuccessful state filings. He filed a habeas petition with the Sacramento

3. Chavis added an argument that counsel failed to object to amendment of the information to allege that Chavis personally used a firearm, subjecting him to enhanced punishment under California Penal Code section 12022.5(a), despite Chavis's expressed concern. Pet. App. F at 1.

County Superior Court on December 15, 1998, his second in that court, but the court ordered that petition "not filed" because Chavis had not properly filled out the appropriate forms. Pet. App. A at 5. On January 25, 1999, he refiled his second habeas petition with the superior court, which denied the petition on February 24, 1999. *Id.* Chavis then filed his second habeas petition with the California Supreme Court on December 17, 1999. *Id.* The petition was denied on March 29, 2000. J.A. 33.

C. Federal District Court Proceedings

On August 30, 2000, Chavis filed his federal petition for a writ of habeas corpus. Pet. App. A at 6. The magistrate judge issued findings and recommended that Chavis's federal habeas petition be denied as barred by the AEDPA statute of limitations. *Id.* The district court adopted the findings and recommendation, and dismissed the petition. *Id.*

D. The Decision Below

The Ninth Circuit reversed. The court found that the one-year limitations period was not tolled for a total of 363 days and that Chavis's petition was therefore timely with two days to spare. Pet. App. A at 11-12.

As noted, Chavis let more than three years pass between the California Court of Appeal's denial of his habeas petition and filing a petition presenting essentially the same claims in the California Supreme Court. Accordingly, contended the Warden, Chavis had unreasonably delayed in seeking relief from the California Supreme Court and thus did not have a state application for state collateral review "pending" for the period of more than three years prior to that filing. In the absence of tolling for this period, the additional days in which the limitations period ran pushed Chavis well outside the one-year limitations period.

The Ninth Circuit ruled, however, that Chavis was entitled to statutory tolling throughout his entire first round of state petitions, including the entire three-year period of inactivity

between the California Court of Appeal's denial of the petition and the filing of the next petition in the California Supreme Court. Pet. App. A at 9. The court therefore found that the limitations period had run for only 363 days and thus had not expired. *Id.* at 12.

The Ninth Circuit recognized that, according to this Court's decision in *Saffold*, Chavis's petition could not be considered "pending" during the three-year interval before the California Supreme Court petition was filed if Chavis had unreasonably delayed in filing it. *Id.* at 8 (citing *Saffold*, 536 U.S. at 223, 225). The Ninth Circuit, however, refused to determine whether the three-year delay constituted unreasonable delay under state law and thereby failed to toll the AEDPA limitations period. *Id.* at 9. Thus, the court did not apply the standard for timeliness set out by the California Supreme Court in *Harris*, under which a state habeas petition is timely if it is "filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 855 P.2d at 398 n.7.

Instead, the Ninth Circuit asserted that "the only relevant inquiry is whether the state court denied the petition as untimely." Pet. App. A at 9. In this case, the California Supreme Court disposed of Chavis's petition by issuing a summary denial without comment or citation. *Id.*; J.A. 32. The Ninth Circuit observed that "[w]hen the California Supreme Court denies a habeas petition without comment or citation, we have long treated the denial as a decision on the merits." Pet. App. A at 9. The court concluded that "because Chavis's November 1997 habeas petition to the California Supreme Court was denied on the merits, it was pending during the interval between the Court of Appeal decision and the Supreme Court petition and he is entitled to tolling." *Id.* The court did not explain how this approach could be reconciled with the holding in *Saffold*, 536 U.S. at 225-26, that a denial on the merits does not, in and of itself, indicate that a state habeas

petition was timely filed. The court merely cited the Ninth Circuit's decision on remand in *Saffold*, which did not provide such an explanation either. *Id.* (citing *Saffold v. Carey*, 312 F.3d 1031, 1034-36 (9th Cir. 2002)).

SUMMARY OF ARGUMENT

AEDPA places a statute of limitations on the filing of petitions for writs of habeas corpus by state prisoners. More specifically, petitions filed by prisoners challenging non-capital state convictions or sentences must be filed within one year from the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). Congress included the limitations period to "curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (opinion of Stevens, J.); *see also id.* at 404 (majority opinion). To give the states a full opportunity to correct constitutional errors in their judgments, AEDPA provides that the limitations period is tolled while the prisoner is pursuing state collateral review. The AEDPA limitations period and tolling provision were crafted to achieve a balance that "'promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments.'" *Saffold*, 536 U.S. at 220 (quoting *Duncan*, 533 U.S. at 178). Of course, if a prisoner does not make proper use of state procedures in pursuing collateral relief, the balance struck in AEDPA is upset. In particular, if a prisoner fails to comply with state timeliness requirements, exhaustion is accomplished at the expense of the interest in finality.

According to this Court's decision in *Saffold*, a prisoner will receive statutory tolling for the intervals between denial of relief by a lower court and application to a higher court, as well as while the application is under consideration by the court, but only if the prisoner complies with state timeliness requirements in proceeding from the lower court to the higher court. *Saffold*,

536 U.S. at 225. In California, this means the federal court must decide whether the prisoner filed in the higher court without unreasonable delay. *Id.*; *see Harris*, 855 P.2d at 398 n.7.

Contrary to *Saffold*, the Ninth Circuit has framed the "relevant inquiry" in determining statutory tolling during the intervals as "whether the state court denied the petition as untimely." Pet. App. A at 9. If not, the Ninth Circuit presumes that the decision was on the merits and that the petition was timely filed. *Id.* The Ninth Circuit therefore grants statutory tolling for the interval preceding the filing, no matter how lengthy.

This conflicts with this Court's decision in *Saffold*. This Court made it clear that a state court's decision on the merits, whether explicit or presumed, does not in and of itself establish that the state court petition was timely filed. *Saffold*, 536 U.S. at 225-26. As this Court explained, "A court will sometimes address the merits of a claim that it believes was presented in an untimely way. . . ." *Id.* at 225.

Moreover, the Ninth Circuit failed to consider whether its presumption of timeliness would reach the correct result in most cases. Had it examined California practice, it would have found that most state petitions for writ of habeas corpus are summarily denied by the appellate courts without timeliness findings or any other explanation. This is because California appellate courts make a preliminary assessment of the petition, and "[i]f the court determines that the petition does not state a prima facie case for relief or that the claims are all procedurally barred," the court will issue a "summary denial." *Romero*, 883 P.2d at 391. No statement of reasons is required. Accordingly, many petitions can be, and are, denied without the court ever even reaching the question of timeliness because they do not present a prima facie case. If, on the other hand, the petition survives the court's preliminary assessment, an adversary proceeding begins, the parties file pleadings, and relief will not be granted if the petition was untimely. The Ninth Circuit therefore misunderstands California practice when it presumes that a summary denial indicates that the state petition was timely filed.

The result of the Ninth Circuit's opinion in *Chavis* is that thousands of California state habeas petitions must be considered timely by the federal district court and all will receive statutory tolling for the period preceding their filing, no matter how lengthy a period that might be and "even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226.

To avoid this subversion of the AEDPA limitations period, the federal courts must determine for themselves whether a summarily-denied state habeas petition was timely filed before allowing statutory tolling for the intervals between filings. This does not interfere with California state court decisions, but actually respects California law and practice. Nor will this mire the federal courts in difficult state law inquiries. Although California's timeliness standard is indeterminate, its requirements of reasonableness and due diligence are common concepts in the law in general and in federal habeas practice in particular. A California petitioner bears the burden of pleading and proving timeliness in the state court petition. And the Attorney General can lodge the state court documents, direct the federal court's attention to the relevant dates and facts, and make an argument regarding timeliness where appropriate.

ARGUMENT

THE ONE-YEAR LIMITATIONS PERIOD APPLICABLE TO RESPONDENT'S FEDERAL HABEAS CORPUS PETITION WAS NOT TOLLED DURING THE THREE YEARS THAT PASSED BEFORE HE FILED HIS FIRST HABEAS PETITION WITH THE CALIFORNIA SUPREME COURT

A. *Carey v. Saffold* Held That AEDPA's One-Year Limitations Period Is Not Tolled By The Filing Of An Untimely Application For State Collateral Review And That A Federal Court Should Not Conclude That A California State Court Found A Habeas Petition To Be Timely Merely Because It Denied The Petition On The Merits

The tolling provision of the AEDPA one-year statute of limitations provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation . . . ." 28 U.S.C. § 2244(d)(2). This tolling provision "balances the interests served by the exhaustion requirement and the limitations period." *Duncan*, 533 U.S. at 179 (quoted in *Rhines v. Weber*, 125 S. Ct. 1528, 1534 (2005)). It promotes the exhaustion of state remedies, the concern of subdivision (b)(1)(A) of section 2254, by preserving a prisoner's right to seek relief in federal court after exhausting state remedies. At the same time, the tolling provision accommodates the states' interest in finality, the concern of subdivision (1) of section 2244(d), by permitting tolling "only" while a "'properly filed application for State post-conviction or other collateral review . . . is pending.'" *Duncan*, 533 U.S. at 179 (quoting 28 U.S.C. § 2244(d)(2)). The result is that petitioners will receive the benefit of continuous statutory tolling while invoking one full round of the state's collateral review scheme, so long as they properly pursue state remedies.

1. Statutory Tolling Is Allowed Only For The Proper Use Of State Collateral Remedies

Tolling begins when an application for state collateral relief is "properly filed." "An application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). A state's "time limits, no matter their form, are 'filing' conditions." *Pace*, 125 S. Ct. at 1814.

Therefore, if a state court has rejected an application for collateral relief as untimely, "that [is] the end of the matter," there is no tolling. *Id.* at 1812 (quoting *Saffold*, 536 U.S. at 226); *see also Pace*, 125 S. Ct. at 1814. If the state court has not rejected an untimely petition as improperly filed under state law, the AEDPA period of limitation is tolled beginning on the day of its filing.

A properly filed application for state collateral review is, of course, "pending" and tolls the period of limitation while under consideration by the court. In *Saffold*, this Court considered whether an application could also be pending, as that word is used in the AEDPA tolling provision, during the intervals between a lower state court's denial of an application for collateral review and the filing of a notice of appeal to a higher state court, permitting tolling for that period of time as well. *Saffold*, 536 U.S. at 216-23.

The Court held that, generally, a state prisoner's application for habeas corpus relief is pending "as long as the ordinary state collateral review process is 'in continuance' -- i.e., 'until the completion of' that process.'" *Id.* at 219-20 (quoting Webster's Int'l Dict. 1669 (1993)). "In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.'" *Id.* at 220 (quoting 28 U.S.C. § 2244(d)(2)). An application may therefore be pending during the time between a lower state court's denial of an application for collateral review and the filing of a notice of appeal to a higher state court, as well as while it is under consideration, providing the possibility of continuous statutory tolling. In California's collateral review system, this means that a petitioner may receive the benefit of tolling during the period between denial of state habeas relief by a lower court and the filing of an original state habeas petition at the next level. *Id.* at 223.

Having resolved this threshold issue, this Court turned to the question presented in California's petition for writ of certiorari: Whether an application for state collateral review is

"pending" when the application filed in the state appellate court is untimely. This Court answered "no"; an untimely application for state collateral review is not "pending" during the period of delay. *Id.* at 225; *see id.* at 223; *see also Pace*, 125 S. Ct. at 1812, 1814. The one-year limitations period for filing federal habeas corpus petitions set forth in 28 U.S.C. § 2244(d) is therefore not tolled for that interval. *Saffold*, 536 U.S. at 225.

2. Timeliness Is Not Established By A State Court's Summary Denial On The Merits

Turning to Saffold's case, this Court held that the Ninth Circuit erred in relying on the fact that the California Supreme Court denied Saffold's petition "on the merits and for lack of diligence." *Saffold*, 536 U.S. at 226. The Ninth Circuit had reasoned that Saffold's petition had to have been timely filed because the phrase "on the merits" showed that the state court had considered the merits. *Id.* This Court disagreed, explaining that there are many reasons why a state court "will sometimes address the merits of a claim that it believes was presented in an untimely way." *Id.* Accordingly, "[g]iven the variety of reasons why the California Supreme Court may have included the words 'on the merits,' those words cannot by themselves indicate that the petition was timely." *Id.* at 226. The Court added that:

> [T]he Ninth Circuit's apparent willingness to take such words as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts. *See, e.g., Welch v. Newland*, 267 F.3d 1013 (C.A.9 2001) (finding limitations period tolled during 4-year gap).

Id. This Court therefore vacated the Ninth Circuit's judgment and remanded the case so that the Ninth Circuit could reconsider whether Saffold's state court petition was timely. *Id.* at 226-27.

B. Under *Carey v. Saffold*, A Habeas Petition Summarily Denied By A California Appellate Court Should Not Automatically Be Deemed Timely-Filed And, Therefore, Should Not Automatically Toll The AEDPA Limitations Period

Now we reach the issue in this case: what if the state court order is silent as to the reasons for the denial? Must the federal court determine for itself whether the application was timely under state law before granting tolling? The Ninth Circuit believes that it need not do so, and that the petitioner gets tolling for the preceding interval. But this cannot be reconciled with *Saffold* or with actual practice.

1. *Saffold* Teaches That, Where A State Court Does Not Expressly Address The Timeliness Of A Habeas Petition, The Federal Court Must Independently Determine Whether The State Petition Was Timely Filed

It is clear from this Court's opinion in *Saffold* that its holding applies whether the state court denial of habeas relief was "on the merits and for lack of diligence," as in *Saffold*, 536 U.S. at 225, or unexplained, as in the present case. As this Court observed in *Saffold*, the AEDPA tolling provision gives states "the opportunity to complete one full round of review, free of federal interference. Inclusion of California's reasonableness periods carries out that purpose in the same way, and to the same degree, as does inclusion of the more specific appellate filing periods prevalent in other states." *Id.* at 222-23. It follows that allowing tolling for the intervals serves no purpose if the petitioner fails to file within the state's time requirements.

This is why, having concluded that a state habeas petition may be pending during the intervals between a lower court decision and filing in a higher court, *id.* at 223, this Court identified the pertinent question as "whether Saffold delayed

'unreasonably' in seeking California Supreme Court review. If so, his application would no longer have been 'pending' during this period." *Id.* at 225. This constitutes a clear instruction to the federal courts to look to and apply state timeliness standards. In no way does it suggest that a federal court should simply grant tolling for the preceding interval as long as the state court did not explicitly deny the petition for delay. The Ninth Circuit was therefore quite wrong to frame the pertinent question in the present case as whether the state court expressly denied the petition as untimely. *See* Pet. App. A at 9.

This Court recognized in *Saffold* that California law applies a general reasonableness standard rather than precise time limits for seeking collateral review. *Saffold*, 536 U.S. at 221-22. The Court went on to say that "[t]he fact that California's timeliness standard is general rather than precise may make it more difficult for federal courts to determine just when a review application (i.e., a filing in a higher court) comes too late." *Id.* at 223. This can only mean that this Court contemplated that the federal courts would determine for themselves whether a state application was timely in the absence of a clear ruling from the state court.

In remanding to the Ninth Circuit to perform this very task, this Court held that the Ninth Circuit had erred in avoiding the question of unreasonable delay. *Saffold*, 536 U.S. at 226. The California Supreme Court had denied Saffold's petition "on the merits and for lack of diligence." *Id.* at 225-26. The Ninth Circuit had reasoned that the petition had to have been timely filed because the phrase "on the merits" showed that the state court had considered the merits. *Id.* at 225. This Court explained why that reasoning was flawed, and why a denial on the merits does not compel a conclusion that the petition was timely filed:

> A court will sometimes address the merits of a claim that it believes was presented in an untimely way: for instance, where the merits present no difficult issue; where the court wants to give a reviewing court alternative grounds for decision; or where the court wishes to show a prisoner (who may not have a lawyer) that it was not merely a procedural technicality that precluded him from obtaining relief. Given the variety of reasons why the California Supreme Court may have included the words "on the merits," those words cannot by themselves indicate that the petition was timely. And the Ninth Circuit's apparent willingness to take such words as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts. *See, e.g., Welch v. Newland*, 267 F.3d 1013 (finding limitations period tolled during 4-year gap). The Ninth Circuit's rule consequently threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.

Id. at 225-26.

This reasoning applies with equal force to a summary unexplained disposition that only impliedly denies a petition "on the merits." The explicit wording of this Court was that "those words ['on the merits'] cannot by themselves indicate that the petition was timely." *Id.* at 226. If an explicit ruling on the merits (such as the ruling in Saffold's case) cannot be taken as an "absolute bellwether" of timeliness, it follows a fortiori that an implied or presumed ruling on the merits (such as the ruling on Chavis's petition) cannot either.

The absence of a specific finding of untimeliness in the state court order therefore does not take this case outside the holding of *Saffold*. This is further confirmed in the above-quoted passage by this Court's reference to, and implicit criticism of, the Ninth Circuit's decision in *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001) [hereinafter *Welch*], *vacated by Welch v. Carey*, 341 F.3d 869 (9th Cir. 2003) (granting

rehearing en banc). In *Welch*, the Ninth Circuit considered a petition filed in the California Supreme Court four years and five months after denial by the lower court. *Welch*, 267 F.3d at 1015. The petition was denied by the California Supreme Court without comment or citation, just as in this case. *Id.* The Ninth Circuit allowed tolling for the four-year gap "[b]ecause the California Supreme Court had addressed the petitioner's claim on the merits." *Id.* at 1017. In *Saffold*, this Court quite correctly referred to *Welch* as an example of how the Ninth Circuit's reliance on a merits determination "risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226. Under the Ninth Circuit's reasoning in *Chavis*, however, Welch's habeas petition filed in the California Supreme Court after a delay of four years and five months would have to be considered timely.[4/]

This case, like *Welch*, "threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Saffold*, 536 U.S. at 226. This Court's reference to *Welch* in *Saffold* would have been meaningless had the Court intended its ruling to apply only where a state court denied a petition expressly "on the merits" *and* "for lack of diligence."

Finally, the dissent in *Saffold* understood that the majority's decision meant that federal courts would have to decide the issue of timeliness to apply the AEDPA tolling provision even in the absence of a state court finding. The dissent correctly noted that "[w]hile there may be cases, like this

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4. Ultimately *Welch* was vacated by an en banc panel of the Ninth Circuit, which disallowed tolling for the period of four years and five months, on the ground that, by dropping his original claim, Welch had abandoned his first full round of review and had initiated a new round. *Welch v. Carey*, 350 F.3d 1079, 1082 (9th Cir. 2003) (en banc). The en banc panel therefore did not decide whether the four-year gap, followed by a summary denial without comment or citation, resulted in an untimely filing. *See id.* at 1083-84.

one, where the California courts expressly deny a petition for lack of diligence, the California courts routinely deny petitions filed after lengthy delays without making specific findings of undue delay." *Id.* at 235 (Kennedy, J., dissenting). The dissent pointed out that, under the majority's decision, "federal courts will be required to assess" timeliness in those cases as well. *Id.*

In this case, the Ninth Circuit actually recognized that "[t]he *Saffold* Court held that a petition is considered pending during such intervals unless the petitioner unreasonably delayed filing a new petition at a higher level." Pet. App. A at 8. Indeed, the court agreed with the Warden that *Saffold* applied to the question of whether Chavis's petition was pending between filings. *Id.* And of course, it had to be readily apparent that the three years that Chavis allowed to slip by between the California Court of Appeal's order and filing in the California Supreme Court probably was unreasonable -- but the court did not reach the question.

Instead of following this Court's decision in *Saffold*, the Ninth Circuit relied on its own presumption that the California court's unexplained denial was a denial on the merits to conclude that Chavis's petition was timely filed despite a three-year period of inactivity. But this Court had expressly stated in *Saffold* that such a rule "risks tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226. The decision below is, on its face, in direct conflict with this Court's decision in *Saffold*.

2. Summary Denial Of A Habeas Petition By A California Appellate Court Does Not Indicate, One Way Or The Other, The Court's View On Whether The Petition Was Timely Filed

"[F]or purposes of applying a federal statute that interacts with state procedural rules" the federal court should "look to how a state procedure functions. . . ." *Saffold*, 536 U.S. at 223. When state practice is examined, it is plain that this Court was

correct to instruct the federal courts that a state court's summary denial on the merits does not establish that the application for collateral review was timely under state law.

a. Under California Practice, A Summary Denial Often Issues Without The Court Reaching The Issue Of Timeliness

Under California state habeas procedure, as described in the Statement of the Case, the appellate courts are led to consider *two* questions as a threshold matter: whether a procedural bar is "apparent," and whether the petition states a prima facie case for relief. The petition may be summarily denied based on *either* one or the other ground: "[i]f the court determines that the petition does not state a prima facie case for relief *or* that the claims are all procedurally barred, the court will deny the petition outright, such dispositions being commonly referred to as 'summary denials.'" *Romero*, 883 P.2d at 391 (emphasis added). The state appellate court can therefore act both expeditiously and fairly by first considering the issue that can most easily be resolved from the information before it. Accordingly, many petitions can be, and are, denied because they do not present a prima facie case without the court ever even reaching the question of timeliness. This is why the Ninth Circuit is wrong to say that "the relevant inquiry is whether the state court denied the petition as untimely." Pet. App. A at 9. And this is why the Ninth Circuit cannot simply presume that an unexplained summary denial indicates that the state habeas petition was necessarily timely filed.

This practice of making a preliminary assessment of the petition is actually very similar to the preliminary review of a petition for writ of habeas corpus conducted by the federal courts under Rule 4 of the Rules Governing Section 2254 Cases. Under that rule, "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition . . . ." As in California practice, the rule permits the court to "screen out

frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Advisory Committee's Note on Rule 4 of the Rules Governing Section 2254 Cases; *see also Mayle v. Felix*, 125 S. Ct. 2562, 2570 (2005). The rule plainly permits the federal district court to summarily dismiss a petition for failure to make a prima facie case for relief. Advisory Committee's Note on Rule 4 (the petition must "state facts that point to a real possibility of constitutional error" to avoid dismissal). Yet no one could seriously contend that dismissal under Rule 4 establishes that the federal petition was timely filed.

In actual practice, there are several reasons why California appellate courts may in fact not decide the issue of timeliness at the stage before a summary denial issues. First, there has not yet been an adversarial process in which issues are identified and argued. California law does not require that the petition be served on the respondent warden. *Clark*, 855 P.2d at 762 n.36. As the California Supreme Court recognizes, "[T]he burden on respondents to reply to the several thousand delayed and successive petitions filed each year in this court, the courts of appeal, and the superior eourts would be intolerable." *Id.* (noting statistics from 1990-1991). The respondent warden files a pleading *only* if the court has found that the petitioner has made a prima facie case for relief and issues an order to show cause.[5] Then, of course, the respondent will raise and argue the issue of timeliness to the court, if appropriate.

Second, often it will simply be easier to first examine

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5. Prior to issuing either a summary denial or an order to show cause, California rules permit the appellate courts to request that the respondent provide an informal response. *Romero*, 883 P.2d at 394; Cal. Rules of Court, rule 60. The informal response is not a pleading and only serves a "screening function" for the court. *Romero*, 883 P.2d at 394. Through the informal response, the respondent may demonstrate that the petition should be summarily denied, thereby saving judicial resources. *Id.*; *Durdines v. Superior Court*, 90 Cal. Rptr. 2d 217, 222 & n.10 (Cal. Ct. App. 1999).

whether the petitioner has made a prima facie case. As noted before, California's timeliness standard is indeterminate and there are several exceptions to the bar of untimeliness that require a fact-intensive inquiry. The habeas corpus petition "must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 855 P.2d at 398 n.7. The petitioner "must explain and justify any substantial delay in presenting a claim." *Clark*, 855 P.2d at 750 (citing *In re Swain*, 209 P.2d 793, 795 (Cal. 1949)); *see also In re Sanders*, 981 P.2d 1038, 1042, 1054 (Cal. 1999). Untimeliness itself is not so difficult to ascertain; however, that does not end the inquiry for the state court because a claim that is untimely under this standard may still avoid the bar of untimeliness and be considered on the merits if it falls within one of the exceptions for a fundamental miscarriage of justice identified by *Clark*:

> (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the error or omission no reasonable judge or jury would have imposed a sentence of death; or (4) that the petitioner was convicted or sentenced under an invalid statute.[6]

Clark, 855 P.2d at 760-61 (footnotes omitted); *accord*, *Sanders*, 981 P.2d at 1043. So, even if the court finds the petition untimely under California's reasonableness standard, it would

6. The first three exceptions are analyzed under state law; the fourth under federal law. *In re Robbins*, 959 P.2d 311, 318 (Cal. 1998).

then undertake to "read the petition to assure [itself] petitioner's factual allegations do not make a prima facie showing his case falls within one of the four exceptions to the timeliness requirement set forth in *Clark*" before denying the petition as procedurally barred. *Sanders*, 981 P.2d at 1044.

Also, the procedural bar of untimeliness often will not be as readily "apparent" as other procedural bars. *See Clark*, 855 P.2d at 741 n.9 ("unless a procedural bar is apparent, the court will determine whether the petition states a prima facie case" before issuing a summary denial). If a claim is barred for lack of a contemporaneous objection, for example, that will likely be stated in the superior court's denial, as the superior court is required to set forth "a brief statement of reasons" for its denial. Cal. Rules of Court, rule 4.551(g). The problem of delay, on the other hand, often arises after the superior court denial. And since the court must look at the merits of the petition to determine whether an exception to the bar of untimeliness applies, it often will be as efficient or more efficient to decide whether the petitioner has failed to make a prima facie case for relief. As this Court recognized in *Saffold*, a court may decide an application for collateral review on the merits despite untimeliness "where the merits present no difficult issue." *Saffold*, 536 U.S. at 225.

Third, the sheer numbers of habeas petitions that must be adjudicated lead California courts to make a preliminary determination based on whether the petitioner has made a prima facie case for relief. In the fiscal year 2002-2003, the California Supreme Court disposed of 2,866 original proceedings. Judicial Council of California, 2004 Court Statistics Report 9, *available at* http://www.courtinfo.ca.gov/reference/documents/csr2004.pdf. Of these, 2,849 were disposed of without opinion. *Id.* Alternative writs or orders to show cause issued in seventeen of these proceedings. *Id.* The vast majority (2,566) of the original proceedings before the court were petitions for writs of habeas corpus. *Id.* at 6. In the fiscal year 2002-2003, the California Court of Appeal disposed of 8,407 original

proceedings. *Id.* at 9. Written opinions issued in 824 of those. *Id.*

Clearly, the appellate courts must find the most efficient means of deciding these thousands of petitions. Experience having shown that it is generally easier to determine whether the petitioner has alleged specific facts that would entitle him to relief, rather than to consider whether each of the various procedural bars are present, California appellate courts would be justified in making a practice of looking for a prima facie case first in all cases. And in fact, that is exactly what the California Court of Appeal does. That court issues the vast majority of its summary denials on the basis that the petitioner failed to make a prima facie case for relief:

> The numerous petitions for writs of habeas corpus filed by inmates incarcerated for criminal convictions are a staple of the workload of an appellate court. . . . Established rules of law favor the finality of judgments. Thus, it is not easy to show that an inmate is entitled to a writ of habeas corpus, and most petitions must be denied for the failure to state a prima facie case for relief.

In re White, 18 Cal. Rptr. 3d 444, 446 (Cal. Ct. App. 2004). That court will therefore almost never indicate a procedural bar in its summary denials. How, then, can it be said that these summary denials indicate that the court found the petition timely?

Finally, there may not have been a decision on timeliness before issuance of an unexplained summary denial because the judges of the California state courts have been known to disagree on the value of analyzing whether the claims on a petition for writ of habeas corpus are procedurally barred. This Court has long understood that "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent. . . . [M]any formulary

orders are not meant to convey *anything* as to the reason for the decision." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). After all, "[t]he essence of unexplained orders is that they say nothing." *Id.* at 804.

In short, it is not fair or accurate to assume that a California state habeas petition denied by an unexplained summary order was timely under California law because the state habeas scheme permits -- indeed, encourages -- summary denial without reaching the question of timeliness.

b. California Enforces Timeliness Standards

All of this is not to say that California does not maintain and enforce timeliness standards. To the contrary, California courts "*insist* a litigant mounting a collateral challenge to a final criminal judgment do so in a timely fashion." *Sanders*, 981 P.2d at 1042 (emphasis added). It is only that the issue of timeliness often will not be addressed or resolved until an order to show cause issues and the actual pleadings (return and traverse) are filed.

The California Supreme Court has explained that it is highly important to the State of California for prisoners to proceed without delay to present their claims on habeas corpus, for reasons that this Court has long respected:

> [T]he writ strikes at finality. One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 [] (1989). And when a habeas petitioner succeeds in obtaining a new trial, the "'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time," *Kuhlmann v. Wilson* [(1986) 477 U.S. 436] at 453 [], prejudice the government and diminish the chances of a reliable criminal adjudication. . . .

Clark, 855 P.2d at 746 (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)). The California Supreme Court "agree[s] wholeheartedly" with Justice Harlan's observation that "'No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.'" *Harris*, 855 P.2d at 400 (quoting *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring and dissenting)). The California Supreme Court has also recognized the importance of finality to victims of crime: "[W]e cannot overestimate the value of the psychological repose that may come for the victim, or the surviving family and friends of the victim, generated by the knowledge the ordeal is finally over." *Sanders*, 981 P.2d at 1042.

California therefore has established and enforces timeliness standards: "[W]e *enforce time limits* on the filing of petitions for writs of habeas corpus in noncapital cases as well as in cases in which the death penalty has been imposed." *Id.* (citations omitted) (emphasis added); *see also Robbins*, 959 P.2d at 316.

A petitioner may very well pass the court's preliminary assessment and reach the stage in which, under California law, a "proceeding in which issues of fact are to be framed and decided" is instituted, *see Romero*, 883 P.2d at 393, even though his petition is untimely. But once he reaches that stage, California courts will not grant relief if a petitioner has delayed unreasonably in pursuing his collateral challenges and does not fall within one of the *Clark* exceptions. *Sanders*, 981 P.2d at 1042-43.

c. The California Supreme Court's Practice Of Sometimes Including A Brief Notation Of The Grounds For Its Decision Does Not Mean All Petitions Denied Without Comment Or Citation Are Timely Under California Law

The California Supreme Court has adopted a practice of sometimes including a brief notation in its summary denials indicating the grounds of its decision. *Robbins*, 959 P.2d at 340 n.34. Usually these take the form of a case citation. In 2004, the California Supreme Court issued some 1,174 summary denials (out of 2,426 habeas dispositions) that included a case citation.[7] For example, a citation to *In re Dixon*, 41 Cal.2d 756, 759 (1953) [264 P.2d 513, 514 (Cal. 1953)] indicates the court's finding that the claim is barred because it should have been raised on appeal. *Robbins*, 959 P.2d at 340 n.34. The court will also sometimes include the phrases "on the merits" and/or "for lack of diligence" in a summary order. *Id.*; *see, e.g.*, *Saffold*, 536 U.S. at 217-18. In 2004, the court included the phrase "on the merits" in about twenty summary dispositions and, in six of these, also denied the petition "for lack of diligence." *See* footnote 7. A citation to *Robbins*, 18 Cal. 4th at 780 [959 P2d at 317-18] indicates the procedural bar of untimeliness, as does a citation to *Swain*, 34 Cal. 2d at 302 or 304 [209 P.2d at 795 or 796].

In *Harris v. Superior Court*, the Ninth Circuit reasoned that, because the California Supreme Court sometimes does this, an unexplained denial indicates a decision based on the merits of the petition, and that the exhaustion requirement is thereby satisfied. *Harris v. Superior Court*, 500 F.2d 1124, 1127-28 (9th Cir. 1974). In the instant case, the Ninth Circuit seemed to leapfrog to a conclusion that an unexplained denial by the California Supreme Court not only usually reflects a denial on

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7. This information was compiled from a search of the Lexis database California State Cases, Combined (cacts) using the following query: "petition w/5 habeas w/5 (denied or denying) and date is 2004."

the merits, but also indicates that the court has considered and rejected all other bases for a denial, such as timeliness. Pet. App. A at 9; *see Hunter v. Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992). There are several problems with applying this conclusion to a statutory tolling analysis.

First, the California Supreme Court has explained exactly when the absence of comment or citation in a summary denial may be taken to mean that the court has determined that a procedural bar does not apply:

> [W]hen respondent asserts that a particular claim or subclaim should be barred . . . or is untimely, *and* when, nevertheless, our order disposing of a habeas corpus petition does not impose the proposed bar or bars as to that claim or subclaim, this signifies that we have considered respondent's assertion and have determined that the claim or subclaim is not barred on the cited ground or grounds.

Robbins, 959 P.2d at 340 n.34 (emphasis added). As discussed above, generally the state court has not heard any argument from the respondent warden when a summary order issues. The absence of comment or citation can only have significance in the minority of cases in which the court has employed the option discussed in footnote 5 of seeking an informal response before deciding whether to deny the petition with a summary order or issue an order to show cause.[8/]

Second, even in those cases in which the Warden has filed a response and asserted untimeliness, a summary denial issued without a reference to a procedural bar or untimeliness does not necessarily establish that the court found the petition timely

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8. In *Robbins* itself, the California Supreme Court had requested an informal response. *Robbins*, 959 P.2d at 317. The case resulted in a published opinion because the court issued an order to show cause, not to consider the merits, but to provide guidance on some procedural issues including timeliness. *Id.* The claims were ultimately denied by an appended summary order. *Id.* at 317, 340.

filed. There is a distinction "between time limits and procedural bars." *Pace*, 125 S. Ct. at 1814 (citing *Artuz*, 531 U.S. at 8-10); *see also Saffold*, 536 U.S. at 225. That is, the state court may find a petition untimely, but decide not to impose the procedural bar of untimeliness.

In California, the basic timeliness requirement is that a petition be filed "within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 855 P.2d at 398 n.7. The petitioner "must explain and justify any substantial delay in presenting a claim." *Clark*, 855 P.2d at 750 (citing *Swain*, 209 P.2d at 795); *see also Sanders*, 981 P.2d at 1042-43, 1054. A petition that is substantially delayed without a showing of due diligence is untimely under California law. *Robbins*, 959 P.2d at 317-18; *see also Harris*, 855 P.2d at 398 n.7; *Clark*, 855 P.2d at 753; *Swain*, 209 P.2d at 795-96.

California courts will nevertheless excuse untimeliness and consider the merits if a petitioner alleges facts, which proven, would establish a fundamental miscarriage of justice. *Clark*, 855 P.2d at 760. To this end, the California Supreme Court developed the four exceptions set out in Part B(2)(a). If a petitioner demonstrates that his case falls within one of the *Clark* exceptions, it is still *untimely* under California law, but the state court will refrain from applying the *bar* of untimeliness. *Clark*, 855 P.2d at 760-61.

This Court recognized this distinction when it observed that "[a] court will sometimes address the merits of a claim that it believes was presented in an untimely way." *Saffold*, 536 U.S. at 225. And this is why, even if an unexplained court order is presumed to address the merits, that does not necessarily indicate that the petition was timely filed. In particular, the fact that the California Supreme Court has not included a citation indicating a procedural bar in a summary denial order does not support a negative inference that the court found the petition timely. It may only mean that the court excused the

untimeliness.

Third, to the extent that the absence of a comment or citation provides clues about the basis of a California Supreme Court order, such reasoning fails when applied to the California Court of Appeal. Although the California Supreme Court frequently will indicate a procedural bar in its summary orders, the California Court of Appeal generally does not. But the Ninth Circuit's broad and irrebuttable presumption applies to all California state appellate court orders.

In sum, California's state habeas scheme, similar to the federal scheme, provides for a preliminary assessment of the petition by the court. Most state habeas petitions are properly denied at this stage for failure to state a prima facie case for relief without the court reaching the issue of timeliness. These petitions are summarily denied; no statement of reasons is required under California law. The Ninth Circuit is therefore mistaken in presuming that an unexplained denial means that the state court considered the petition timely.

C. The Ninth Circuit Erred In Adopting An Irrebuttable Presumption That Habeas Petitions Summarily Denied By California Appellate Courts Were Timely Filed

A closer look at the Ninth Circuit's reasoning and comparison with this Court's federal habeas jurisprudence only confirms that the Ninth Circuit's rule regarding unexplained denials cannot stand.

The Ninth Circuit reached its result by creating its own presumption, applicable to all of the thousands of California state court unexplained orders denying habeas relief issued every year: these petitions are all timely filed and merit retroactive tolling. The presumption is sweeping and irrebuttable. It does not comport with this Court's careful and judicious use of presumptions in federal habeas review. *See Ylst*, 501 U.S. 797; *Coleman v. Thompson*, 501 U.S. 722 (1991); *Harris v. Reed*, 489 U.S. 255 (1989). While the Ninth Circuit's

presumption may serve as a rule of convenience for the federal court, it does not respect either the federal statute or California law.

1. Presumptions In Federal Habeas Cases Should Be Crafted To Reach The Correct Result In Most Cases

This Court's jurisprudence provides guidance on the limited use of presumptions in federal habeas cases. In *Coleman v. Thompson*, this Court reviewed its decision in *Harris v. Reed* and clarified the proper use of a presumption in determining whether a federal court should review the claims of a state prisoner. The problem in applying the procedural default doctrine is similar to the problem that arose in this case: it is often difficult to determine the basis of the state court decision. *Coleman*, 501 U.S. at 732; *Harris*, 489 U.S. at 262.

This Court crafted a presumption to apply as a "partial solution." *Coleman*, 501 U.S. at 732. Federal courts will

> presume that there is no independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion."

Id. at 735 (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)); *see also Harris*, 489 U.S. at 263. This is often referred to as the "*Harris* presumption."

In *Ylst v. Nunnemaker*, this Court considered a silent, unexplained California Supreme Court order. *Ylst*, 501 U.S. at 800. In that case, this Court said, the *Harris* presumption could not apply to determine whether the decision was based on procedural default or the merits because the predicate for application of the presumption was missing in that it could not be said that the state court decision fairly appeared to rest

primarily on federal law or was interwoven with federal law. *Id.* at 802. The Court created a new presumption: "[w]here there had been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Id.* at 803. The Court reasoned that this would lead to an accurate result most of the time, in that the more usual practice is for a court to affirm without further discussion when it agrees with the reasoning of the court below. *Id.* at 804. Under those circumstances, then, federal courts should presume that, where the last reasoned state court opinion on a claim imposes a procedural default, a later unexplained decision did not disregard the bar and consider the merits. *Id.* at 803.

The point is that the *Harris* and *Ylst* presumptions were created based on an analysis of what meaning could fairly be extracted from an ambiguous or unexplained state court order. And, notably, they are not broadly drawn. By setting out certain predicates and defined circumstances for their application, the Court can be confident that the presumptions will both serve judicial efficiency *and* reach the correct result in most cases.

2. California State Court Practice Provides No Support For The Ninth Circuit Presumption

The presumption promulgated by the Ninth Circuit in this case, on the other hand, was imposed arbitrarily as a rule of convenience, favors federal review without the benefit of supporting analysis, and, in any event, addresses the wrong question. In the decision below, the Ninth Circuit simply cited its decision in *Hunter v. Aispuro* for the proposition that a California state court's unexplained denial of habeas relief is conclusively presumed to be a decision on the merits, so that the claims are not procedurally barred and are subject to federal review. Pet. App. A at 9 (citing *Hunter*, 982 F.2d at 348). In *Hunter*, both the California Court of Appeal and the California Supreme Court had denied state habeas relief without explanation. *Hunter*, 982 F.2d at 347. The Ninth Circuit

recognized that neither the *Harris* nor the *Ylst* presumption could be employed under these circumstances. *Id.* The court further recognized that *Harris* and *Ylst* required it to determine whether the state court order was based on a procedural bar or on the merits -- "not an easy task." *Id.* The Ninth Circuit decided that "a California Supreme Court's denial of a habeas petition without comment or citation constitute[s] a decision on the merits of the federal claims, and thus such claims [will] be subject to review in federal habeas proceedings." *Id.* at 347-48 (quoting *Harris v. Superior Court*, 500 F.2d at 1228-29 (creating the same presumption to find claims exhausted)).

The first problem with the Ninth Circuit's reliance on the *Hunter* presumption in *Chavis* is that it answers the wrong question. In *Hunter* and *Harris v. Superior Court*, the Ninth Circuit had to decide whether the state courts' unexplained denials were decisions on the merits for the purpose of determining whether the claims were procedurally defaulted or exhausted. But the question that *Saffold* required the Ninth Circuit to decide in *Chavis* was *not* whether the California Supreme Court reached the merits of Chavis's 1997 habeas petition, and it had nothing to do with procedural default. The question was whether Chavis had unreasonably delayed in bringing his claims to the court three years after denial by the lower court. As this Court has explained, a conclusion that the state court reviewed or considered the merits of a prisoner's claims before denying relief does not resolve the question whether the petition was timely filed. *Saffold*, 536 U.S. at 225-26; *see also Pace*, 125 S. Ct. at 1812-14.

Furthermore, this Court's opinions in *Coleman* and *Ylst* make it clear that the Ninth Circuit did not undertake the appropriate analysis before creating a new conclusive presumption. In applying the *Hunter* presumption in this new context, the Ninth Circuit made no attempt to determine whether it would actually achieve the correct result in almost all cases. *See Coleman*, 501 U.S. at 737. Conclusive presumptions are "designed to avoid the costs of excessive inquiry" but only

"where a *per se* rule will achieve the correct result in almost all cases." *Id.* However, "the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Id.*

Here, the Ninth Circuit has made no effort to evaluate whether petitions for habeas corpus denied by California courts without comment or citation are timely under California law "most of the time." And as discussed in more detail in Part B(2), such an analysis would not support the Ninth Circuit's conclusion. Again, even if an unexplained order is presumed to be a decision on the merits, that does not answer the question whether the court addressed the merits because the petition was timely or because it excused an untimely filing or because it was simply easier to do so. Moreover, while the California Supreme Court frequently will at least indicate a procedural bar in its orders, *Robbins*, 959 P.2d at 340 n.34, the California Court of Appeal generally does not. *See* Part B(2)(c).

The Ninth Circuit seemed to adopt the rationale offered in *Hunter* for assuming that its conclusive presumption would be accurate most of the time. That is, because the Ninth Circuit first stated that an unexplained California Supreme Court order would be presumed a decision on the merits in *Harris v. Superior Court* in 1974, the California Supreme Court must be issuing its orders accordingly. *Hunter*, 982 F.2d at 348; *see* Pet. App. A at 9 ("When the California Supreme Court denies a habeas petition without comment or citation, we have long treated the denial as a decision on the merits."). But this turns the guiding principle of conclusive presumptions on its head. A presumption should reflect actual practice, not dictate it. Indeed, this Court has rejected this very argument that "a broadly applicable presumption is not counterfactual after it is announced." *Coleman*, 501 U.S. at 738. The Court explained:

> We can establish a *per se* rule that eases the burden of inquiry on the federal courts in those cases where there are few costs to doing so, but we have no power to tell state courts how they must write their opinions. We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim--every state appeal, every denial of state collateral review--in order that federal courts might not be bothered with reviewing state law and the record in the case.

Id. at 739.

A state court will not necessarily respond to the announcement of a presumption, such as the one announced in *Chavis*, by issuing express findings in every case. *Id.* at 738. Many state courts are overburdened and have other concerns that compete with the "dignity interest in seeing that their state law decisions are not ignored by a federal habeas court." *Id.* at 738. State courts should not have to shoulder the burden of shielding their decisions from federal review; the federal courts should take on the burden of justifying interference. As this Court has said, "A broad presumption would also put too great a burden on the state courts. It remains the duty of the federal courts, whether this Court on direct review, or lower federal courts in habeas, to determine the scope of the relevant state court judgment." *Id.* at 739. Here, the Ninth Circuit has created a rule of convenience and shifted the burden to the state courts so that it "might not be bothered with reviewing state law and the record in the case," *id.*, to determine whether a state habeas petition was timely.

The broad and irrebuttable presumption employed by the Ninth Circuit in *Chavis* is all the more problematic because the danger in its use is not that the doctrine of comity will be offended, as in *Coleman*, *Ylst*, *Harris*, *Hunter*, and *Harris v. Superior Court*, but that the express purpose of a federal statute will be thwarted. As the Ninth Circuit noted in *Harris v. Superior Court*, "[T]he doctrine which requires the exhaustion

of state remedies before the federal court will entertain habeas corpus petitions is based on comity and is not a limitation on the power or jurisdiction of the federal courts." *Harris v. Superior Court*, 500 F.2d at 1126-27. By contrast, the AEDPA period of limitation is exactly that: a limitation on the power of the federal court to review state court judgments. *See Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003) ("In the interest of finality AEDPA constrains a federal court's power to disturb state-court convictions").

In short, the Ninth Circuit has ignored this Court's instructions in *Saffold* and, instead, instituted its own conclusive presumption, which again "threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims," *Saffold*, 536 U.S. at 226, and seriously undermines Congress's intent to "curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams*, 529 U.S. at 386 (opinion of Stevens, J.); *see also id.* at 404 (majority opinion).

D. The Ninth Circuit's Rule Would Have The Negative Effect Of Either Forcing California State Courts To Rule On The Timeliness Of All Habeas Petitions Or Undermining The AEDPA Limitations Period

If the Ninth Circuit's rule is allowed to stand, it will have one of two possible effects, both unacceptable.

As it stands now, under *Chavis*, every petition that is denied after the state court's preliminary assessment with an unexplained summary denial will be presumed timely. The California Supreme Court issued 1,223 unexplained denials out of 2,426 summary dispositions in 2004. (See Part B(2)(c) regarding Lexis search.) The California Court of Appeal decided 4,556 out of 4,761 criminal "original proceedings" without a written opinion in the fiscal year 2002-2003. 2004 Court Statistics Report, *supra*, at 35. And as discussed above

and as noted in the *Saffold* dissent, "the California courts routinely deny petitions filed after lengthy delays without making specific findings of undue delay." *Saffold*, 536 U.S. at 235 (Kennedy, J., dissenting).

Nevertheless, under *Chavis*, *all* of these thousands of California petitions must be considered timely by the federal district court and *all* will receive statutory tolling for the period preceding their filing, no matter how lengthy a period that might be and "even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226; *see, e.g.*, *Gaston v. Palmer*, 387 F.3d 1004, 1018 (9th Cir. 2004) (allowing tolling for gaps of 307 and 282 days because the California courts summarily denied Gaston's petitions without making findings of untimeliness or lack of diligence). This is manifestly contrary to Congress's intent in enacting AEDPA. The one-year limitation period is intended to "reduce the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S. at 179; *accord*, *Rhines*, 125 S. Ct. at 1534; *see* H.R. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944 (purpose of habeas corpus reform in AEDPA is "to curb the abuse of the statutory writ of habeas corpus"). The tolling provision exists primarily for the benefit of the state, in that it "promotes the exhaustion of state remedies," thereby allowing the state courts the first opportunity to resolve constitutional claims. It does this by preserving a state prisoner's ability to apply for federal habeas relief after exhaustion, incidentally benefitting the prisoner. *Duncan*, 533 U.S. at 179. But AEDPA requires the prisoner to make proper use of his or her state's established procedures for collateral review while exhausting his claims. 28 U.S.C. § 2244(d)(2); *O'Sullivan*, 526 U.S. at 844-45. The tolling provision does not exist to allow habeas petitioners -- and certainly not California petitioners in particular -- to escape the AEDPA period of limitation by the simple expedient of filing a delayed application in state court in

the hope that the state court may not explicitly reject it for untimeliness for the reasons that it is overburdened with thousands of similar filings and state law does not require such a finding.

And, of course, California's expressed interest in finality is frustrated as well under *Chavis*. The California Supreme Court has made it abundantly clear that it is important to the state that innocence or guilt be vindicated without delay; that vital evidence not be lost or become stale before a new trial; and that victims and/or their families be allowed to recover. *Sanders*, 981 P.2d at 1042; *Robbins*, 959 P.2d at 316; *Clark*, 855 P.2d at 746.

The argument no doubt will be made that California state courts can protect the state's interest in finality by explicitly ruling on the timeliness of each state habeas petition. And this is the other possible result of the *Chavis* holding. This Court, however, has cautioned against imposing this sort of burden on the state courts. *Coleman*, 501 U.S. at 739. The federal courts should not -- indeed, are without power to -- tell the state courts how to issue their decisions or opinions. *Id.* In particular, the federal courts may not impose such a burden just for the convenience of the federal courts. *Id.* In this situation, forcing the California courts to state in every habeas case whether the petition was timely would mean that the courts would have to fundamentally alter California's venerable state habeas corpus scheme or expend valuable resources or both. No longer could the state court expeditiously and summarily dispose of petitions that plainly do not make a prime facie case.

The state court could of course seek assistance in deciding timeliness by obtaining responses from the Attorney General, but the California Supreme Court already explained more than ten years ago that such a burden would be "intolerable," *Clark*, 855 P.2d at 762 n.36 -- and the flood of state habeas filings has not abated since then. The state courts could add numerous judges or staff members, but no one could seriously suggest that this is a viable plan. California could replace its state habeas

scheme with post-conviction rules or statutes that include a simple determinate time limit, as other states have done. But California's reasonableness standard is an "equitable concept [that] is designed to be flexible, and it allows California courts to correct miscarriages of justice, even those which happened long ago." *Saffold*, 536 U.S. at 235 (Kennedy, J., dissenting). California has every right to employ such a system.

On the other hand, not only is it compelled by AEDPA and *Saffold*, but it would be more practical and efficient to have the federal court decide, in those cases in which there is no explicit state court finding, whether a California petitioner's state habeas petitions were timely filed before granting statutory tolling for the intervals between filings. This inquiry would have to be undertaken in a far more limited group of cases. It will *potentially* have to be made in only the cases that reach federal court, and then only where the issue is presented, instead of in all cases in state court whether or not it is necessary to the state court disposition. Even in the smaller number of federal habeas cases, it will not have to be undertaken if the federal petition is filed within the one-year AEDPA period of limitation regardless of tolling. It will not have to be undertaken if the federal court can dismiss the petition on other grounds under Rule 4 of the Rules Governing Section 2254 Cases. In some cases, a clear ruling from the state superior court or other court will render the state petition not properly filed under *Pace*, and that will resolve the question of statutory tolling. Moreover, the federal court will be able to conserve judicial resources by identifying those cases that may be dismissed as time-barred by the AEDPA limitations period.

E. The Ninth Circuit's Rule Is Inconsistent With The Practice In All Other Circuits To Have Addressed The Issue

Other courts -- and some Ninth Circuit judges -- have understood how the AEDPA limitations period and tolling provision must work with state practice and procedure. Judge

Kleinfeld has written (in dissent):

> "Congress and the courts appropriately built slack into the process by providing a reasonable grace period for pending applications, not for open-ended and unjustified delay in pursuing claims and relief." [*Welch v. Carey*, 350 F.3d at 1083] . . . 307 and 282 days exceed a "reasonable grace period." Legal deadlines are usually on the order of 7, 10, 30, and 60 days.
>
> The point of the play in the joints allowed by *Saffold* and *Welch* [*v. Carey*] is to fold California's unusual procedure into something akin to an ordinary state appellate exhaustion process, with the exception, as the Court noted in *Saffold*, that instead of the usual fixed and rigid period for filing notice of appeal, California allows a reasonable time to take a claim "up the ladder" to the next higher court. Expanding this to a petitioner who goes down the ladder instead of up, and who waits the better part of a year between filings, makes a mockery of the statute of limitations that Congress has imposed.

Gaston, 387 F.3d at 1020 (Kleinfeld, J., dissenting).

In *Allen v. Mitchell*, 276 F.3d 183 (4th Cir. 2001), the Fourth Circuit confronted the same situation that the Ninth Circuit faced here. As in California, there is no "fixed appellate deadline under North Carolina law." *Id.* at 186. Under North Carolina law, a non-capital prisoner whose "motion for appropriate relief" has been denied by the superior court may seek review by filing a petition for certiorari in the North Carolina Court of Appeals, and such a petition "must be filed 'without unreasonable delay.' N.C.R.App. P. 21(e)." *Id.* As in this case, the North Carolina Court of Appeals rejected Allen's petition through a summary order, without making any finding of untimeliness. *Id.* Unlike the Ninth Circuit, however, the Fourth Circuit did not interpret the state court order as

conclusively establishing that the state petition was timely and did not shift the burden to the state courts to make an express finding of timeliness in every case.

The *Allen* court recognized that, although Allen's petition had not been dismissed as untimely by the state court, it did not follow that there was no "unreasonable delay" under the North Carolina statute. *Allen*, 276 F.3d at 186-87. This is because "the court of appeals may simply have opted to 'excuse[] the untimeliness as a matter of state law and rule[] on the merits.'" *Id.* at 187 (quoting *Fernandez v. Sternes*, 227 F.3d 977, 981 (7th Cir. 2000)). Consequently, the *Allen* court remanded the case for further proceedings to determine whether Allen's certiorari petition was timely under the state's "without unreasonable delay" standard that required a determination of whether or not the petition would be subject to dismissal under the equitable doctrine of laches. *Id.* at 187.

In *Fernandez*, 227 F.3d at 981, the Seventh Circuit severely criticized the Ninth Circuit's tolling rule as originally set forth in *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000) [hereinafter *Saffold I*], *amended*, 250 F.3d 1262, *vacated by Saffold*, 536 U.S. at 227, stating that it preferred "reality" over the Ninth Circuit's "make-believe approach, under which petitions were *continuously* pending whenever a state court allows an untimely filing." The Seventh Circuit explained that:

> It is sensible to say that a petition continues to be "pending" during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was "pending" in the interim.

Fernandez, 227 F.3d at 980.

The *Fernandez* court's critique of the Ninth Circuit's

original tolling rule is equally applicable to the conclusive presumption of timeliness established in the instant case, which simply resurrects the approach taken in *Saffold I.* The Ninth Circuit's continued practice of granting tolling under 28 U.S.C. § 2244(d)(2) for delays of many months or years "as long as the state court denied the belated request on the merits" continues to be, in the words of the Seventh Circuit, an "implausible understanding of § 2244(d)(2)" that will "sap the federal statute of limitations of much of its effect." *Fernandez*, 227 F.3d at 980.

Decisions from the Fifth, Tenth, and Eleventh Circuits show that *Allen* and *Fernandez* represent the majority view. *See Moore v. Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003) (holding "that the petitioner's belated appeal motion was not pending during the limitations period" because such an application "does not relate back so as to toll idle periods"); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) (holding that "[a] state court's subsequent decision to allow review may toll the time relating directly to the application, but it does not change the fact that the application was not pending prior to the application. Thus, after the appeal period has lapsed, an application ceases to be pending but a subsequently properly filed application entitles the petitioner to additional tolling beginning at the time of the 'proper' filing"); *Gibson v. Klinger*, 232 F.3d 799, 804 (10th Cir. 2000) (holding that a "state court's grant of leave to appeal out of time cannot erase the time period during which nothing was pending before a state court").[9]

Just as prisoners who fail to timely file their applications for state collateral review in states with precise time limits will

9. The Fourth, Fifth, and Tenth Circuits would, however, allow statutory tolling for the period in which the prisoner could have filed a timely request for review by a higher state court. *Allen*, 276 F.3d at 187; *Melancon*, 259 F.3d at 406-07; *Gibson*, 232 F.3d at 803. The Warden agrees with the Seventh Circuit that a petition, application, or request that is not actually filed cannot be considered pending during the period provided for doing so. *Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000).

fail to qualify for tolling during the period of delay even though their state courts choose to decide their claims on the merits or not to make a finding of untimeliness, prisoners in California who fail to timely file their state petitions by engaging in substantial delay under California law should not qualify for tolling under *Saffold* even though the state court may have addressed their claims on the merits and even though the state court did not make an explicit finding of untimeliness.

F. Federal Courts Must Therefore Determine For Themselves Whether A Summarily-Denied California Habeas Petition Was Timely Filed, Where That Is Necessary To Resolving The Timeliness Of A Federal Habeas Petition

In light of the purpose of the AEDPA limitations period and tolling provision, this Court's decision in *Saffold*, and state practice, the Ninth Circuit was wrong to institute a conclusive presumption that all applications for state habeas relief are timely filed if the California appellate court issues an unexplained summary denial. In those cases that present the question whether a California prisoner unreasonably delayed between state court filings so that he is not entitled to statutory tolling, the federal court will be quite capable of making the determination. The issue will be raised by the State Attorney General on behalf of the respondent warden. The Attorney General always considers whether a federal petition is subject to dismissal based on the AEDPA period of limitation or other reasons, and files motions in appropriate cases. The Attorney General can thereby direct the court's attention to the relevant dates and documents, and make an argument based on California's timeliness standards for the court's consideration.

To meet the California requirement of timeliness "the habeas corpus petition must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 855 P.2d at 398 n.7.

California's Judicial Council form petition implements California's requirement that the petitioner establish timeliness, and California law provides considerable guidance in applying its flexible standard. Moreover, standards such as reasonableness and due diligence are quite common in the law and courts are regularly called upon to apply such terms.

Indeed, these terms appear in the federal habeas statutes. For federal prisoners, the AEDPA period of limitation may start running on "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of *due diligence*." 28 U.S.C. § 2255, ¶ 4 (emphasis added). There is a similar provision for state prisoners: the AEDPA period of limitation may start running on "the date on which the factual predicate of the claim or claims presented could have been discovered though the exercise of *due diligence*." 28 U.S.C. § 2244(d)(1)((D) (emphasis added). This is remarkably similar to the California standard. And as this Court recently noted in applying the due diligence requirement of section 2255, "[c]ertainly . . . 'due diligence' is an inexact measure of how much delay is too much. But the imprecision here is no greater than elsewhere in the law when diligence must be shown. . . ." *Johnson v. United States*, 125 S. Ct. 1571, 1581 n.7 (2005). And, in fact, this Court had no difficulty in applying the concept to the facts in the case before it. *See id.* at 1582. Similarly, the term "unreasonable . . . is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Williams*, 529 U.S. at 410 (discussing 28 U.S.C. § 2254(d)).

In practice, California's timeliness standards require a prisoner to present his habeas claims quickly. The California Supreme Court has explained that a petition for writ of habeas corpus "should be filed as promptly as the circumstances of the case allow." *In re Stankewitz*, 708 P.2d 1260, 1262 n.1 (Cal. 1985); *accord*, *Clark*, 855 P.2d at 738 n.5. "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information

offered in support of the claim and the legal basis for the claim." *Robbins*, 959 P.2d at 317, 322; *accord*, *Sanders*, 981 P.2d at 1042-43. For most claims arising out of a trial, "[t]hat time may be as early as the date of conviction." *Clark*, 855 P.2d at 738 n.5.

Generally, habeas claims involving matters outside the record, such as ineffective assistance of counsel, should be presented in conjunction with the direct appeal. *Harris*, 855 P.2d at 398 n.7. Claims that are based solely on facts in the appellate record must be raised on direct appeal first, then may be renewed in a timely fashion on habeas corpus *if* they come within an exception to the rule that claims raised and decided on appeal cannot be presented on habeas corpus. *Id.*; *see In re Waltreus*, 397 P.2d 1001, 1005 (Cal. 1965). If a petitioner presents claims based on facts discovered after conviction, the petitioner must establish, with specificity, due diligence in investigating both the facts and the legal bases for relief. *Clark*, 855 P.2d at 745, 748; *Stankewitz*, 708 P.2d at 1262 n.1.

Of course, these guidelines focus on the filing of an initial petition in superior court, the timeliness of which is generally irrelevant in considering whether a petitioner is entitled to tolling for the interval after denial by a lower court and before filing at the next level. But it can be inferred from the guidelines provided by the California Supreme Court that California law contemplates that a prisoner will seek state habeas relief at least as expeditiously as he would pursue his appeals.[10/] In California, defendants must file notice of their direct appeal sixty days after mailing or service of the notice of entry of the judgment against them. Cal. Rules of Court, rule 2. It is certainly "reasonable" to expect that petitioners file their state habeas petitions in the Court of Appeal within a similar

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10. Indeed, the very purpose of vesting original habeas corpus jurisdiction in the different levels of state court is to avoid the delays inherent in the appellate process and to thereby expedite the process. *Mazoros*, 142 Cal. Rptr. at 612.

time frame, particularly when it is a matter of re-filing an already composed petition in a higher court.

Defendants who seek review of a California Court of Appeal decision must file a petition for review in the California Supreme Court within ten days after the Court of Appeal's decision is final.[11/] Cal. Rules of Court, rule 28(e). Indeed, this is the preferred alternative for a habeas petitioner whose petition has been denied by the Court of Appeal. *Saffold*, 536 U.S. at 224-25 (citing *Reed*, 663 P.2d at 217 n.2); *see* Cal. Penal Code § 1506; Cal. Rules of Court, rule 28(e)(1). Surely, then, it is not permissible for a state habeas petitioner to extend this time indefinitely by choosing the alternative of filing an original petition in the California Supreme Court. It is reasonable to expect a habeas petitioner to file a petition in the California Supreme Court within a similar time frame.

These are reasonable expectations in practice. Recently, this Court considered "reasonable time limits" for a petitioner to return to state court to exhaust claims while his mixed federal petition is held in abeyance. *Rhines*, 125 S. Ct. at 1535. The Court instructed that the district court should usually condition the stay on the petitioner applying to the state court within thirty days of the stay order, and returning to federal court within thirty days of the state court order. *Id.*

And as this Court observed in *Saffold*, other states specify limits "such as 30 or 45 days" for appealing the denial of habeas relief to the next tier of reviewing court. *Saffold*, 536 U.S. at 222. California's habeas scheme functions in practice very much like a collateral review scheme that provides for appellate review. *Id.* at 221-23. That is, the California scheme leads the state prisoner to present his claims first to the trial court and then proceed to a higher court so that "a prisoner who files [the] same petition in a higher, reviewing court will find that he can obtain the basic appellate review that he seeks, even though it

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11. The Court of Appeal's summary denial of a petition for writ of habeas corpus is final upon filing. Cal. Rules of Court, rule 24(b)(2)(A).

is dubbed an 'original' petition." *Id.* at 222. A California prisoner should therefore be filing essentially the same claims in the appellate courts that he filed in the trial court. *See id.* at 221-22.

In California, a petition for writ of habeas corpus is not a complex document. The prisoner is required only to state a prima facie case for relief. *Romero*, 883 P.2d at 393, 395. California law contemplates that the claims will be fully argued in the return and traverse, which become the principal pleadings.

In short, a petition for writ of habeas corpus should be filed in a California appellate court within sixty days after denial by a lower court. If not, the federal court should examine the petitioner's response to question 15 of the California Judicial Council form petition and any attached exhibits for the petitioner's explanation. In most cases it will not be difficult to determine whether the delay was unreasonable.

G. The Ninth Circuit Should Have Reviewed The Habeas Petition Chavis Filed With The California Supreme Court After A Three-Year Delay And Concluded It Was Untimely

"It remains to ask whether [Chavis] delayed 'unreasonably' in seeking California Supreme Court review. If so, his application would no longer have been 'pending' during this period." *Saffold*, 536 U.S. at 225.

On the record before the district court, it is not difficult to see that this three-year period constituted unreasonable delay. The California Court of Appeal denied Chavis's petition for writ of habeas corpus on September 29, 1994. J.A. 18. Chavis filed a petition for writ of habeas corpus presenting essentially the same claims plus one new subclaim, *see* footnote 3, in the California Supreme Court on November 10, 1997, more than three years later. Pet. App. F at 1. Of course, delayed presentation alone does not bar consideration of the merits of a habeas corpus petition. The court will consider the reasons

proffered for the delay. But it was therefore incumbent upon Chavis to "allege with specificity when he became aware of the factual and legal bases for the claims" and to point to particular circumstances sufficient to justify substantial delay in response to question 15 on the form petition. *Clark*, 855 P.2d at 753.

The explanation that Chavis offered to the California Supreme Court was as follows: "Your petitioner is a layman of law and was illegally and actively being denied access to the court by the prison petitioner is confined. Your petitioner was granted an intrainstitutional appeal to attain access to the court. (See Exhibit 1)." J.A. 20.

Chavis attached several documents from the prison relating to his access to the law library as Exhibit 1. *See* J.A. 22-31. A memorandum from a prison official reflects that on December 14, 1995, Chavis requested excused time off (ETO) to go to the law library. J.A. 31. The official's response was simply "I cannot grant ETO for you to go to the law library." J.A. 31. On December 19, 1995, Chavis submitted an inmate/parolee appeal form explaining that his work assignment required him to be at work at all times that the prison law library was open. J.A. 25-28. Chavis also explained that he had requested ETO from his job assignment, and that request had been rejected. J.A. 26, 28. Finally, Chavis explained that he had requested a change in his job assignment, which had been approved but never occurred. J.A. 28. Chavis requested that higher authority grant him ETO or that he receive a different job assignment. J.A. 26.

An "Appeal Log" for a "first level response," created by a prison Program Sergeant and dated January 12, 1996, denied ETO, but advised Chavis that he could still request a change in his work assignment. J.A. 29. In his "second-level" appeal, the Warden ordered on February 8, 1996, that Chavis would receive a hearing before the Unit Classification Committee to determine whether he could be assigned to a work position that would accommodate his need to use the law library. J.A. 23-24.

This is, on its face, an insufficient explanation for the three-year delay in filing a petition in the California Supreme

Court. Based on his own exhibits, Chavis's efforts to obtain access to the law library began on December 14, 1995, more than one year after the California Court of Appeal denied his petition on September 29, 1994.

Moreover, in Respondent's Reply to Petitioner's Opposition to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus, the Warden provided the federal district court with an additional document. Chavis did in fact receive a different job assignment at his request on March 5, 1996. J.A. 73-74. He nevertheless delayed another eighteen months before filing his petition in the California Supreme Court in November 1997.

Chavis did not "allege with specificity when he became aware of the factual and legal bases for the claims." *Clark*, 855 P.2d at 753. There is therefore no basis from which it can be found that any of the supporting facts were only recently discovered. In any event, perusal of the claims in the November 1997 petition reveals that all of the claims of ineffective assistance of trial counsel in ground one were known to Chavis, or should have been known to him, at the time of his conviction in 1991. *See* Exh. F to Federal Petition. The claim of ineffective assistance of appellate counsel raised as ground two was, by Chavis's own account, known to him at the time of his direct appeal in 1992. *See id.*

In this case, then, it is a simple matter to apply California's reasonableness standard and conclude that Chavis's November 1997 state petition for writ of habeas corpus was untimely. And *Saffold* requires that Chavis not receive the benefit of statutory tolling under AEDPA for the interval of more than three years in which Chavis had no petition pending.

Under AEDPA, the one-year period of limitation commenced for Chavis on April 24, 1996. *Saffold*, 536 U.S. at 217. In the absence of tolling for the three-year period of delay, it expired at the end of the grace period, on April 24, 1997. *See Pace*, 125 S. Ct. at 1817. Chavis's August 2000 federal petition for writ of habeas corpus is time-barred, the district court was

correct to dismiss it, and the Ninth Circuit was wrong to reverse the district court.

CONCLUSION

For the above reasons, the Warden respectfully requests that this Court reverse the Ninth Circuit's decision in *Chavis* and reinstate the district court's dismissal of Chavis's application for writ of habeas corpus.

Dated: July 15, 2005 Respectfully submitted,

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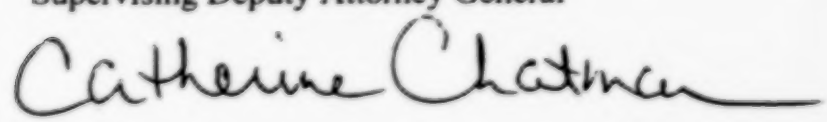

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Supreme Court of the United States

MIKE EVANS, Warden,

Petitioner,

v.

REGINALD CHAVIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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